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No. 364

In the Supreme Court of the United States

OCTOBER TERM, 1950

UNITED STATES OF AMERICA, PETITIONER

v.

ALLIED OIL CORPORATION, P. & M. LIQUOR CORP., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered on July 19, 1950.

OPINION BELOW

The opinion of the Court of Appeals (R. 128-132) is reported at 183 F. 2d 453.

JURISDICTION

The judgments of the Court of Appeals were entered on July 19, 1950 (R. 132-135). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether pending suits for the recovery of damages for sales at prices in excess of those established by applicable regulations under the Emergency Price Control Act of 1942, as amended (50 U.S.C. App. 901, *et seq.*), may be maintained by the United States in its own name, or must be maintained in the name of the Secretary of Commerce.

EXECUTIVE ORDERS INVOLVED

Executive Orders 9841 (12 F.R. 2645) and 9842 (12 F.R. 2646) are set forth in the Appendix, *infra*, pp. 13-20.

STATEMENT

The six cases here involved were brought in the United States District Court for the Northern District of Illinois under Section 205(e) of the Emergency Price Control Act of 1942 as amended (50 U.S.C. App. 925(e)), for the recovery of damages for sales allegedly at prices in excess of the maximum prices prescribed by applicable OPA regulations (R. 6-7, 34-37, 54-58, 74-78, 94-96, 112-114). Complaints against Allied Oil Corp. P. & M. Liquor Corp. and Nicro Steel Products, Inc. were filed respectively on July 10, 1944, November 1, 1944 and May 21, 1945, all in the name of Chester Bowles, Price Administrator (R. 6, 34, 54). Two complaints, those against Harvey, Inc. and Eva Metnick, were filed respectively on April 26, 1946

and December 3, 1946[1] by Paul A. Porter, then Price Administrator (R. 74, 94). The complaint against Jack Stein and Harry Robins was filed April 15, 1947 by Philip B. Fleming, Temporary Controls Administrator (R. 112). The complaint in each action expressly recited that the action was brought "for and on behalf of the United States."

Thereafter, in due course, the names of successor Price Administrators were substituted as plaintiff in each case (R. 8, 38, 58-59, 79, 97).

The cases were pending in this posture when, on April 23, 1947, the President issued Executive Orders 9841 and 9842 (Appendix, *infra*, pp. 13-20). The former order distributed the functions which had been lodged first in the Price Administrator and then in the Office of Temporary Controls. The distribution of functions resulted in the assignment of duties to the Housing Expediter, the Secretary of Agriculture, the Reconstruction Finance Corporation, and the Secretary of Commerce. Executive Order 9842, relating to the conduct of certain litigation under wartime legislation, authorized and directed the Attorney General

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[1] OPA Supplementary Order 193 (11 F.R. 13464) decontrolled as of November 10, 1946, all the commodities of which overceiling sales were alleged in the six suits, but Section 1(b) of the Emergency Price Control Act (10 U.S.C. 901(b)) provided "that as to offenses committed, or rights or liabilities incurred, prior to such termination date, the provisions of this Act and such regulations, orders, price schedules, and requirements shall be treated as still remaining in force for the purpose of sustaining any proper suit, action, or prosecution with respect to any such right, liability, or offense."

to conduct and maintain in the name of the United States or otherwise as permitted by law specified litigation including "Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control."

Within six months of June 1, 1947, the effective date of the material provisions of the Executive Orders, the Government obtained orders from the district court substituting the United States as plaintiff in each case (R. 9, 39, 60, 79, 97, 115). Two and one-half years later, on January 9, 1950, the district court, upon motion of the defendants, determined that the United States was not the real party in interest and that the Secretary of Commerce was the real party in interest. Accordingly, orders were entered vacating the prior orders which had substituted the United States as plaintiff and dismissing the actions because the Secretary of Commerce had not been timely substituted as plaintiff (R. 17-20, 39-42, 60-62, 80-82, 98-100, 119-121).

Upon the Government's appeals to the Court of Appeals for the Seventh Circuit, the orders were affirmed (R. 131-132). The court held that a proper construction of the Executive Orders required that the litigation should have been conducted in the name of the Secretary of Commerce.

REASONS FOR GRANTING THE WRIT

In holding that the United States may not conduct in its own name a treble damage action under the Emergency Price Control Act, the decision of the court below is squarely in conflict with recent decisions of the Eighth, Ninth and Tenth Circuits, which have held that the United States is the real party in interest in a treble damage action and may conduct litigation in its own name. The decision affects more than 100 such suits now pending in the District Court for the Seventh Circuit. If followed elsewhere, some of the more than 400 additional cases in other circuits will likewise be affected.[2] This would be tantamount to a grant of judicial amnesty[3] to persons charged with violations of earlier controls and could not but have an adverse effect upon the administration and enforcement of new controls now in effect, as well as others likely to follow.

1. The decision below is squarely in conflict with *Fleming* v. *Goodwin*, 165 F. 2d 334 (C.A. 8), certiorari denied *sub nom. Goodwin* v. *United States*, 334 U.S. 828; *United States* v. *Koike*, 164

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[2] This information as to pending OPA enforcement suits was reported in incomplete replies to Department of Justice Order No. 3732, Supplement No. 43, dated May 22, 1950, requesting such advice from all United States Attorneys. In none of these cases, so far as we know, was the Secretary of Commerce substituted as plaintiff.

[3] Since the one year statute of limitations (50 U.S.C. App. 925(e)) has run in all these cases it will be impossible to commence any of them anew.

F. 2d 155 (C.A. 9); *Northwestern Lumber and Shingle Co.* v. *United States*, 170 F. 2d 692 (C.A. 10).[4]

These circuits have adhered to the settled rule of law that actions such as those at bar, as the Eighth Circuit stated, are "in substance and reality at all times a controversy between the Government and the appellees" warranting the substitution of the United States as plaintiff, *Fleming* v. *Goodwin*, 165 F. 2d at 338.

That the United States is the real party in interest is plain from a reading of Section 205(e) of the Emergency Price Control Act.[5] That section specified that these actions should be brought "on behalf of the United States." In the trial court, the complaints in the present actions were entitled in the name of the Administrator "for and on behalf of the United States", and the complaints demanded judgment against the defendant

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[4] See also, *Ralph D'Oench Co.* v. *Woods*, 171 F. 2d 112 (C.A. 8); *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C.A. 4); *Porter* v. *Steger*, 74 F. Supp. 109, 113 (D. Md.); *Fleming* v. *People's Natural Gas Co.*, 8 F.R.D. 42, 45 (W.D. Pa.); cf. *Porter* v. *Maule*, 160 F. 2d 1, 3 (C.A. 5).

[5] Section 205(e) (50 U.S.C. App. 925(e)) provided in pertinent part as follows:

"If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period."

"for and on behalf of the United States." See *Larsen* v. *Domestic and Foreign Corp.*, 337 U.S. 682, 686; *Louisiana* v. *McAdoo*, 234 U.S. 627, 629; *Seven Oaks* v. *Federal Housing Administration*, 171 F. 2d 947 (C.A. 4). It is apparent that as the real party in interest the United States could have instituted these actions in its own name, notwithstanding that the Emergency Price Control Act also permitted the Administrator to make himself the nominal plaintiff. In *United States* v. *Summerlin*, 310 U.S. 414, 416, this Court dealt with a similar provision in the National Housing Act (12 U.S.C. 1702) as follows:

> The claim assigned to the Federal Housing Administrator acting on behalf of the United States became the claim of the United States, and the United States thereupon became entitled to enforce it.

Since the action plainly is for the United States, the Eighth, Ninth and Tenth Circuits properly allowed the United States to be substituted as a party. Any other result amounts to a disregard of reality.

2. In our view, the basic difficulty with the reasoning of the court below is the court's failure to recognize that the United States always is the real party in interest in a treble damage action. Once this is recognized, the court's construction of the Executive Orders is without a firm foundation. The President, by Executive Order 9842,

directed the Attorney General to maintain litigation against price control violators "in the name of the United States or otherwise as permitted by law." This assumed, as the Eighth, Ninth and Tenth Circuits have held, that the United States is the real party in interest in a treble damage action and that in this circumstance the litigation properly could be conducted in the name of the United States. It is with respect to this assumption that the area of conflict exists which requires resolution by this Court.

The court below thought that Executive Order 9841 transferred to the Secretary of Commerce "the remaining functions of price control" (R. 130), and that this included the litigation of treble damage actions in the name of the Secretary of Commerce, notwithstanding the admitted fact that the entire conduct of the litigation was lodged by Executive Order 9842 in the Attorney General. But even a casual examination of Executive Order 9841 demonstrates that the Price Administrator's functions were not transferred *in toto* to the Secretary of Commerce; they were divided up and parceled out to the various interested agencies of the Government (see *supra*, pp. 3-4).[6] The

[6] Broad discretion to distribute OPA functions and powers to such agencies as he saw fit was given to the President by Section 201(b) of the Emergency Price Control Act (50 U.S.C. App. 921(b)) and Title I of the First War Powers Act (50 U.S.C. App. 601). Section 201(b) provided in pertinent part—

"The President is authorized to transfer any of the powers and functions conferred by this Act upon the Office of Price

function of conducting litigation against violators of price orders relating to commodities which are no longer subject to controls was lodged in the Attorney General. The net result of the decision below is to recognize the Attorney General as the delegate of litigation powers but to insist that the Secretary of Commerce is an indispensable party to the proceedings even though he has nothing to do with them. Nothing in the law requires such an absurd result.

It is true that Executive Order 9841 lodged in the Secretary of Commerce power to conduct litigation, but that power, it should be noted, did not extend to litigation involving price control orders relating to commodities which are no longer subject to controls. Thus, Section 302 of Order 9841, without any reference to the conduct of litigation, transferred to the Secretary of Commerce all the not otherwise disposed of "functions" of the Temporary Controls Administrator. Section 402 defined "functions" as including "authority on the part of each officer to whom

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Administration with respect to a particular commodity or commodities to any other department or agency of the Government having other functions relating to such commodity or commodities, * * *."

The First War Powers Act authorized the President:

"to make such redistribution of functions among executive agencies as he may deem necessary, including any functions, duties, and powers hitherto by law conferred upon any executive department, commission, bureau, agency, governmental corporation, office, or officer, in such manner as in his judgment shall seem best fitted to carry out the purposes of this title * * *."

such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals) relating to the matters transferred to him * * *." Maintenance of litigation was thus merely an adjunct to the transfer of some function to which the litigation related. The scheme was a logical one. The power to sue for damages and injunctions, to compromise or refuse to compromise, is an important and effective aid in the administration of a substantive program. Thus, under the Emergency Price Control Act, the Price Administrator was given complete control over his own civil litigation. So also, under Executive Order 9841, the transfers of administrative functions were accompanied by the authority to conduct related litigation. See, for example, *Ralph D'Oench* v. *Woods,* 171 F. 2d 112, 114 (C.A. 8). But, with respect to decontrolled commodities, the only thing left to do was to dispose of the suits, and that power was lodged in the Attorney General by Executive Order 9842. Hence, the Secretary of Commerce was vested neither with any functions to which this litigation related nor, consequently, with authority to maintain the litigation. When the contemporaneous orders are read together, as they must be, there is no room for doubt that this is what the President undertook to accomplish.

This view of the Executive Orders was adopted by the Emergency Court of Appeals. *Hal-Mar*

Dress Co. v. *Clark*, 165 F. 2d 222. That court was required to determine whether the Attorney General or the Director of the Division of Liquidation, acting for the Secretary of Commerce, had jurisdiction to act upon an application under Section 205(e) of the Emergency Price Control Act of 1942 as amended (50 U.S.C. App. 925(e)) for the dismissal of a pending OPA treble damage suit. The court decided that the Attorney General had jurisdiction, pursuant to authority granted him by Executive Order 9842.

3. The short of the matter is that a rule of law is being applied in the Seventh Circuit which conflicts with the principle being applied in the remainder of the nation. Affecting as it does the ability to litigate a considerable number of pending treble damage actions, the decision below has important repercussions. It is a decision which, we believe, is clearly incorrect and one which should be reversed by this Court.

4. The issue presented by this petition is the same as one now before this Court in *United States* v. *Munsingwear, Inc.*, Nos. 23 and 24, this Term. See Brief for Respondent, pp. 42-63, and Supplemental Brief for the United States, pp. 13-34. That fact alone warrants consideration of the merits of the judgments below by this Court. See Robertson & Kirkham, *Jurisdiction of the Supreme Court of the United States* (1936), sec. 309, p. 628.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

OCTOBER 1950.

APPENDIX

Executive Order 9841 (12 F. R. 2645) provides as follows:

TERMINATION OF THE OFFICE OF TEMPORARY CONTROLS

WHEREAS the Congress, in the urgent Deficiency Appropriation Act, 1947, approved March 22, 1947, has declared its intent that the Office of Temporary Controls be closed and liquidated by June 30, 1947; and

WHEREAS it is necessary to provide for the orderly liquidation of such Office and the disposition of its residual affairs:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and Statutes, including the last paragraph of Title I of the First Supplemental Surplus Appropriation Rescission Act, 1946, approved February 18, 1946, Title III of the Second War Powers Act, 1942 as amended by the First Decontrol Act of 1947, section 201(b) of the Emergency Price Control Act of 1942, as amended, section 2 of the Stabilization Act of 1942, as amended, and Title I of the First War Powers Act, 1941, and as President of the United States, it is hereby ordered, in the interest of the internal management of the Government as follows:

Part I

101. The Office of Temporary Controls, established by Executive Order No. 9809 of December 12, 1946, shall be terminated and disposition

shall be made of its functions according to the provisions of this order.

Part II

201. The provisions of this Part shall become effective on May 4, 1947.

202. Functions of the Temporary Controls Administrator under the Emergency Price Control Act of 1942, as amended, Executive Order No. 9809, and any other statute, order, or delegation are transferred as follows:

(a) Functions with respect to rent control are transferred to the Housing Expediter and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Government as he may designate.

(b) Functions with respect to price control over rice are transferred to the Secretary of Agriculture and shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Agriculture as he may designate.

(c) Functions with respect to (1) subsidies, including determinations of the correct amounts of claims and the recovery of over-payments (but excluding premium-payment functions transferred under paragraph 302 (b) hereof); (2) applications for price adjustments filed under Supplementary Order 9 and Procedural Regulation 6 (Adjustment of Maximum Prices for Commodities and Services under Government Contracts or Subcontracts, 7 F.R. 5087, 5444) of the Office of Price Administration; and (3) the inter-

pretation and application of price and subsidy regulations and orders which affect the amount of subsidy payable; are transferred to the Reconstruction Finance Corporation.

203. The following functions of the Temporary Controls Administrator are transferred to the Secretary of Commerce and shall be performed by him or, subject to his direction and control, by such officers and agencies of the Department of Commerce as he may designate:

(a) Functions of the President under Title III of the Second War Powers Act, 1942, as amended, vested in the Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to determining, under section 6(a) of the Strategic and Critical Materials Stockpiling Act, the amount of strategic and critical materials necessary to make up any deficiency of the supply thereof for the current requirements of industry.

(c) Functions under section 124 of the Internal Revenue Code, as amended.

(d) Functions under section 12 of the Act of June 11, 1942 (the Small Business Mobilization Act).

(e) Functions with respect to claims relating to the expansion of the capacity of defense plants when such expansion is alleged to have been undertaken at the request of the War Production Board or any of its predecessor agencies.

(f) Functions with respect to claims relating to property requisitioned by the Chairman of the

War Production Board or by any of his predecessors.

(g) Except as otherwise provided by statute or this or any other Executive order, all other functions of the Temporary Controls Administrator which were immediately prior to the taking of effect of Executive Order No. 9809 vested in the Civilian Production Administrator.

204. Executive Order No. 9705 of March 15, 1946 (as modified by Executive Orders Nos. 9762 and 9809) is revoked.

205. Any authority vested in the Temporary Controls Administrator in pursuance of section 120 of the National Defense Act of 1916 (with respect to placing compulsory orders for products or materials) is withdrawn and terminated.

Part III

301. The provisions of this Part shall become effective June 1, 1947.

302. All functions vested in the Temporary Controls Administrator by Executive Order No. 9809 not otherwise disposed of by statute or by this or any other Executive order are transferred to the Secretary of Commerce and shall be performed by him or subject to his direction and control, by such officers or agencies of the Department of Commerce as the Secretary may designate. Such functions shall include, but not be limited to, the following:

(a) Functions of the President under the Stabilization Act of 1942, as amended, vested in the

Temporary Controls Administrator immediately prior to the taking of effect of this Part.

(b) Functions with respect to premium payments under section 2(e)(a)(2) of the Emergency Price Control Act of 1942, as amended, insofar as such payments relate to copper, lead, and zinc ores.

(c) Functions with respect to the establishment of maximum prices for industrial alcohol sold to the Government or its agencies.

(d) The liquidation of the functions of the Office of Temporary Controls and of the agencies thereof, except liquidation relating to functions specifically transferred to other agencies (by the provisions of this order or otherwise).

303. The Office of Temporary Controls is terminated.

Part IV

401. The provisions of this Part shall become effective, respectively, on the dates on which functions are transferred or otherwise vested by the provisions of this order.

402. Functions under the Emergency Price Control Act of 1942, as amended, transferred under the provisions of this order shall be deemed to include authority on the part of each officer to whom such functions are transferred hereunder to institute, maintain, or defend in his own name civil proceedings in any court (including the Emergency Court of Appeals), relating to the matters transferred to him, including any such proceedings pending on the effective date of the

transfer of any such function under this order. The provisions of this paragraph shall be subject to the provisions of the Executive order entitled "Conduct of Certain Litigation Arising Under Wartime Legislation," issued on the date of this order and effective June 1, 1947.

403. (a) The records, property, and personnel relating primarily to the respective functions transferred under the provisions of this order shall be transferred, and the funds relating primarily to such respective functions shall be transferred or otherwise made available, to the agencies to which such functions are transferred. Such measures and dispositions as may be determined by the Director of the Bureau of the Budget to be necessary to effectuate the purposes and provisions of this paragraph shall be carried out in such manner as the Director may determine and by such agencies as he may designate.

(b) In order that the confidential status of any records affected by this order shall be fully protected and maintained, the use of any confidential records transferred hereunder shall be so restricted by the respective agencies as to prevent the disclosure of information concerning individual persons or firms to persons who are not engaged in functions or activities to which such records are directly related, except as provided for by law or as required in the final disposition thereof pursuant to law.

404. All provisions of prior Executive orders in conflict with this order are amended accordingly. All other prior and currently effective orders, rules, regulations, directives, and other

similar instruments relating to any function transferred by the provisions of this order or issued by any agency terminated hereunder or by any predecessor or constituent agency thereof, shall remain in effect except as they are inconsistent herewith or are hereafter amended or revoked under proper authority.

405. As used in this order, "functions" includes powers, duties, authorities, discretions, and responsibilities.

HARRY S. TRUMAN.

THE WHITE HOUSE.
April 23, 1947.

Executive Order 9842 (12 F.R. 2646) provided as follows:

CONDUCT OF CERTAIN LITIGATION ARISING UNDER WARTIME LEGISLATION

By virtue of the authority vested in me by the Constitution and statutes, including Title I of the First War Powers Act, 1941, and as President of the United States, and having regard to the established responsibilities and powers of the Department of Justice and of the Attorney General under the statutes of the United States, it is hereby ordered, in the interest of the internal management of the Government, as follows:

1. The Attorney General is authorized and directed, in the name of the United States or otherwise as permitted by law, to coordinate, conduct, initiate, maintain or defend:

(a) Litigation before the Emergency Court of Appeals for and on behalf of the Secretary of

Agriculture, the Secretary of Commerce, and the Reconstruction Finance Corporation, respectively;

(b) Litigation against violators of regulations, schedules or orders relating to maximum prices pertaining to any commodity which has been removed from price control;

(c) Litigation arising out of Directive 41, as amended, of the Office of Economic Stabilization pertaining to the withholding of subsidies because of noncompliance with or violations of control orders.

2. Nothing herein shall be deemed to restrict or limit the powers conferred upon the Attorney General by law with respect to the conduct, settlement, disposition or review of litigation.

3. The functions and duties of the Attorney General under this order shall be performed by him or, subject to his direction and control, by such officers or agencies of the Department of Justice as he may designate, and there shall be made available to the Attorney General, pursuant to the provisions of Executive Order No. 9784 of September 25, 1946, any files or records pertinent to the subject matter hereof.

4. This order shall become effective June 1, 1947.

HARRY S. TRUMAN.

THE WHITE HOUSE.
April 23, 1947.

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